No. 15118

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED REED WOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of California,
Southern Division

BRIEF FOR APPELLANT

MILDRED REED WOOD

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BRIEF FOR APPELLANT MILDRED REED WOOD

STATEMENT

This is an appeal by Lawrence Gray, Administrator, CTA of the estate of the plaintiff, Mildred Reed Wood, now deceased*, the beneficiary under a National Service Life Insurance Policy #N 10 815 106, from a judgment for the defendant rendered in the United States District Court, Southern District of California, Southern Division, on the 18th day of November, 1955. The verdict by the judge was based upon the stipulated facts and the evidence

adduced at the trial.

The essential facts as stipulated were that the action was brought under the National Life Insurance Act of 1940, as amended; the plaintiff was the duly designated beneficiary; and the face amount of the policy was $10,000. That from the 1st day of June, 1943 until the 31st day of December, 1947, the United States Government had deducted from the pay of Lawrence C. Reed, then in the regular army of the United States, the necessary premium payments on said insurance. That on or about the 31st day of December, 1947, said Lawrence C. Reed retired from the United States Army at the post of Corozal, Canal Zone. The Army Regulations then in force for regular Army personnel, a class in which Lawrence C. Reed belonged, were as follows:

> "CFR Title 10 - Army: War Department Section 308.10
> (e) When a member of the regular army is retired, he may, if he desires, continue Class E allotments for commercial life insurance and also Class D & N allotments. In such a case no action is necessary on the part of the alloter. If such Class E allotments or Class D or N allotments are to be discontinued, A WD AGO Form 141 will be processed for each separate allotment."

The allotment in question was a Class N allotment. Lawrence Reed died on the 6th day of February, 1949 in the Canal Zone. The plaintiff in conformance with all requirements, made a claim in writing to the United States of America for payment of death benefits under the said policy, which claim was disallowed on Aug. 4,

1949, and the Board of Veterans Appeals on Oct. 31, 1950 denied the appeal from the ruling of the Veterans Administration. It was further stipulated that no deductions were in fact made from Reed's retirement pay for the premiums, although no notice was ever sent to Reed to that effect by any governmental agency. At the time Reed retired he signed a form entitled "Enlisted Record and Report of Retirement". In a space on said form headed"Insurance Notice" opposite the words "intention of Veteran to Continue Payment Deducted from Retirement Pay", there was typed an X. The form also showed that the premium due each month was $9.90. No evidence was introduced at the trial on behalf of the defendant. In summary then, Reed's policy was in full force and effect until he retired;when he retired he authorized the Government to deduct premiums from his retirement pay; the government failed to do so, although there was at all times sufficient money due Reed to meet the premiums, that there is no indication that Reed either knew or did not know that the premiums were not being deducted.

QUESTION INVOLVED

The question is simply whether or not the policy of insurance lapsed for non-payment of premiums. To determine this question, a determination of the status of a National Service Life Insurance policy must be made; it must be decided whether the law applicable to private insurance companies is applicable to this type of policy, and if so, what such law is. If the usual law is not applicable, then the question is what particular law is applicable to this specific type of policy.

ARGUMENT

I.

THE COURT ERRED IN REFUSING TO ENTER A VERDICT FOR THE PLAINTIFF FOR THE RELIEF PRAYED

There have been numerous cases decided under the National Service Life Insurance Act, and a great number of them may, in the final instance, be reduced simply to the question of whether or not the policy is forfeited under a variety of facts for non-payment of premium. The cases in the various District Courts, Circuit Courts, and even rulings on applications for certiorari, do not appear at first blush to be harmonious. However, upon careful analysis of the individual cases, a basis for distinction, upon which most of the decisions may be reconciled, is herewith submitted for the court's consideration.

1st Circuit

U.S. vs. Le Page, (1932) 59 F(2d) 165 - 1st Circuit

In this case, no premiums had been paid on the policy due to a ruling of the Government that the insured had not ratified the policy before the expiration of the time allowed by law. The court held as to the construction of the contract, that it should be liberally construed for the insured, and that the fact that no premiums were paid on the policy was not the fault of the insured. The government at all times had sufficient money due the insured to have paid the premium. The court relied on the O'Neill case, infra. The First Circuit thus adopts the non-forfeiture rule.

3d Circuit

U. S. vs. Loveland 25 F (2d) 447 - 3d Circuit

In this case the government had failed to answer letters of inquiry concerning the date premiums were due, and the insured knew that the premiums had not been paid. The plaintiff argued the failure of the government to answer the letters estopped it to deny liability. The court held that those facts alone did not estop the government. In line with the other cases cited herein the court said a servant of the government has no power to bind the United States by acts not authorized by law. The case was reversed on confession of error. This case follows the other Circuits in cases where estoppel based on negligence of a servant, outside the scope of his authority where no forfeiture is involved, is considered.

4th Circuit

U. S. vs. Morrell (1953) 204 F (2d) 490 (Cert. denied 346 US 875)

This appears to be a landmark case in this field, and is cited as authority by many courts. In this case a captain was disabled for a period during which premiums on his National Service policy was waived by statute. After the disability had ceased to exist, the insured failed to pay the premiums, and the government claimed the policy had lapsed for non-payment. The Veterans Administration held funds due the insured, which had accumulated in his account by virtue of his waiver due to disability. The court in deciding this case followed the rule which appears to bring into harmony the other decisions involving this question.

The court said "an insurer is not justified in declaring a forfeiture of an insurance policy for non-payment of premiums when at the time the premiums accrue, the insurer is indebted to the insured either for dividends declared, or other funds belonging to the insured which it may have in its hands." The court also held that the rule as generally stated pertaining to private insurance contracts outlining a policy against enforcement of unnecessary forfeitures of contracts of insurance was equally applicable against the United States, under the National Service Life Insurance Act of 1940. As noted above, the United States Supreme Court denied certiorari in this case.

Mikell vs. United States 64 F (2) 301 - CCA 4th Circuit

In this case, the plaintiff contended that the policy did not lapse for non-payment of premiums because the U.S. Government held funds due the soldier for an increase in rank, which increase was never paid to insured. The court apparently agrees with the plaintiff in this case as to the law, but disagrees as to the facts. The court held that the insured had not specifically directed the government to apply the funds to the payment of premiums, nor was there sufficient funds with which to pay the premiums to the time of death of insured. The Morrell case decided later in this same circuit therefore appears to be in harmony with this case, since in the instant Mikell case, it appears that the court would have held for the plaintiff if the insured had directed the funds to be applied to payment of premiums and there had been sufficient funds, notwithstanding the fact that the government failed to actually make the deductions for that purpose. The court cites the case of Mortek vs. U.S. 297 F 485 in the district court of Illinois, in which case the court held a policy could not lapse so

long as the government owed to the soldier as service pay an amount sufficient to pay the premiums as they became due and according to the plain language of the regulations, which are a part of the contract, and premiums must be treated as paid whether or not deductions are in fact made if upon the date the premiums are due, the government owes to the soldier an amount sufficient to pay the premiums. They further said it did not matter whether the soldier was on active duty or had been discharged.

The court very plainly stated its version of the law when it said "When the government goes into the business of insurance, it is permissible to apply to it the rules applicable to insurance companies so far as transactions relating to insurance are concerned, but no farther."

5th Circuit

Kubala vs. U.S. 210 F (2d) 943 5th Circuit, 1954

The insured had been discharged, but having been disabled for 1 year, his premiums were waived; however, he paid the premiums during the waiver period (disability was established after he had already paid the premiums). The total amount of premiums paid during disability was $66.60, which was sufficient to pay premiums up to time of death. The Veterans Administration did not apply the funds to the payment of premiums which the insured subsequently failed to pay. The court held the Veterans Administration should have applied the funds to prevent a forfeiture of the policy. The court said in paragraph 4, "We have recognized and enforced the proposition that because of the nature and terms of

the insurance granted, the contract of insurance in effect consists of the policy as controlled by the language of the statute authorizing it and valid regulations issued pursuant to the statute. Thus, in many aspects of the matter there comes into play the sovereign capacity which underlies many official acts of omission, as well as commission, in the carrying out of this insurance program. This is particularly applicable in matters such as estoppel and waiver which are generally held not to be effective as against the United States, and as to these the United States is not bound by the same principle which bind commercial carriers.". . . ."But this is not to state that equitable considerations have no place in the administration of the National Service Life Insurance program when their operation does not run counter to the statute or regulations." (Citing Lewis case, infra.)

U.S. vs. Lewis, 202 F (2d) 102 (1953) 5th Circuit

A Veterans Administration officer erroneously wrote insured that his policy was paid up until 1955, when in fact it was paid up only until 1940. The plaintiff argued that the letter set up an estoppel of the U.S. Government. The court held that inasmuch as the employee had no authority to extend the insurance beyond that authorized by law, there was no estoppel. In this case the court specifically held, as it later did in the Kubala case, supra, that an act by a government employee, NOT AUTHORIZED BY REGULATION OR STATUTE, would not bind the government. The court as stated, held the converse in the Kubala case, that an act by an employee WHICH WAS AUTHORIZED BY REGULATION would be binding on the government. The Lewis case was cited as authority for the Kabala case.

The Fifth Circuit also decided in 1952 the case of Siller vs. United States, 195 F (2) 195 involving non-payment of premiums, but the question was whether or not the insured had complied with the procedure for re-instatement, and it was held he did not. The only pertinent decision made in this case (not involving specific questions of reinstatement) was that the burden of proving the non-payment of premiums was on the defendant and not on the plaintiff.

8th Circuit

U.S. vs. Griffin, 216 F (2d) 217 Cert. Denied 348 U.S. 927

Insured went A.W.O.L., his premiums were not paid while he was absent, and his life insurance policy lapsed for nonpayment of premiums. The army regulation provided that pay should cease during the absence without leave of a soldier. The court held that the policy had lapsed, but in so holding distinguishes the case from the Morell case, supra, in that in the Griffin case, the government apparently did not have funds from which to deduct the premiums since all pay by regulation ceased upon the unauthorized absence of the soldier. Therefore, this case seems to lay down the same law, but distinguishes the facts from the cases that might otherwise seem to be contra thereto.

9th Circuit

McIndoe vs. U.S. 194 F (2) 602 CCA 9th Circuit, 1952

Insured had received letter erroneously stating there was credit to pay premiums, and in reliance

thereon, failed to pay them. The court held that the United States may not be estopped to assert any defense available to it. In this case, of course, the government did not owe the insured any money, and the facts were, as in the Kubala and Lewis cases, supra, the plaintiff was relying merely on an act of a government employee not authorized by statute or regulation. This seems to be consistent with the other cases.

Bouvier vs. U.S., 214 F (2) 329 9th Circuit

That the Ninth Circuit Court of Appeals is in harmony with the other circuits on the principle laid down in the Morrell case that the policy of the law is against the declaration of a forfeiture of a policy, even as to the United States, is firmly settled in the Bouvier case, ending any controversy a misconstruction of the McIndoe case might lead to. In the Bouvier case the government had sufficient funds to pay the premium on one policy of insured, but not on both. Instead of applying all the funds to either, the government argued both had lapsed, since they had applied a portion of the funds to each policy for a certain period of months. The court said "Where necessary to apply payment made on behalf of the holder of two national service policies to the payment of the next two monthly premiums on one of the policies as to which insured had filed application for renewal in order to keep both policies in force to date of insured's death, payment must be treated as so applied, even though actually applied as one monthly premium on each policy."...."where the Act (National Service) is open to construction, it is liberally to be construed in favor of the soldier...Where there is no express provision of the act preventing the application of the amounts of the insured's money held by the insurer to prevent a

forfeiture the general rule applies that an insurer should act to prevent forfeiture". Citing American National Co. vs. Yee Lim See 104 F (2d) 688, 694. The court further added "In so holding we are in accord with the 4th Circuit in U. S. vs. Morell, 204 F2d 490 and the Fifth Circuit in Kubala vs. U.S. 210, F2d 943, 945, both cases holding on similar policies that such duty to prevent a forfeiture in no way involved the contention presented by the insurer that so to hold constituted an estoppel against the government."

10th Circuit

Unger vs. U. S. 65 F (2d) 946 10th Circuit

In this case the premiums were deducted from the soldier's pay during his first enlistment, but the government, although authorized to do so, failed to deduct them during the period of reenlistment. The court in holding for the plaintiff stated that the knowledge of the serviceman as to whether deductions were in fact made was not important. They stated that as long as the government owed the soldier money each month for his pay, the policy could not lapse. They cite with approval the Mortek and Lewis cases, supra.

District Court Cases

Crawford vs. U.S. 291 F 801. The court accepts the premise that if the government owes money to insured, the policy of insurance cannot lapse for non-payment of premiums, but the question in this case was whether the term "pay" as used in the War Risk Act included annual retainer for reserve. The court held it did not. However, the court is in agreement with the principle

against forfeiture where funds were available, whether or not applied to pay premiums.

O'Neill vs. U.S. Dist. Ct. of Mass., 32 F (2d) 313

The premiums were deducted during soldier's first enlistment, but the army failed to deduct them on the second enlistment. At the time of the death of insured the government owed him the service pay that had accrued to him for the current pay period, which was sufficient to pay all back premiums. The court held that in view of the army regulations and acts of Congress, since the government owed the soldier his service pay, the insurance could not be forfeited. They said "To hold that the insurance has lapsed for non-payment of premiums is not only to overlook the manifest intention of the regulations which determine the rights of the parties, but also to enable the government to profit by its own default much to the detriment of an innocent beneficiary. Such a result must inevitably lead to the conclusion that the government is now estopped from availing itself of the defense which it has seen fit to set up to this petition." The court distinguishes the facts in this case from those in the Mikell case.

Burk vs. U.S. 133 Supp. 63, Dist. Ct. of Arkansas (1955)

Insured had dividend credits which plaintiff argued should be applied to the payment of premiums to prevent a forfeiture under the rule laid down in the Morell case. Court held that although otherwise proper, the dividends could not be so applied since they became payable on the date of the insured's death, and secondly the statute

concerning such dividends specifically provides that dividends may be applied to premiums on written authority so to do and here no such authority existed. This case follows the theory that moneys due insured should be applied to payment of premiums to prevent a forfeiture unless to do so would be contrary to law, and the court here holds it would be contrary to law under the facts in this case, so to do. The court specifically cites the Morrell case and distinguishes subject case on its facts.

Kalter vs. U.S. 130 F. Sup. 79, Dist. Court of N. Y. 1955

Upon the army discharge of insured, a personnel officer made a notation that the insurance premiums were due on the 31st of the month, when they in fact were due at an earlier date. The only question raised by the court was whether or not the personnel officer's statement effected an amendment of the original contract. The court's answer was that an agent of the United States has no power to enter into an agreement not authorized by law.

Ping vs. U.S. Dist. Ct. of Michigan, 105 F. Supp. 843 (1952)

Although the facts are not too clear, apparently the insured paid a premium in May, then paid another premium in August. The Government employee erroneously gave him a receipt in August indicating the insurance was still in full force and effect. The Court said "It is the universal rule that a beneficiary of an insurance policy has established a prima facie case when the policy naming the plaintiff as beneficiary and

proper proof of death of the insured have been introduced in evidence."...."Various laws under which War Risk and other veterans' insurance plans are administered, to the extent that they are applicable, supercede the pertinent law previously in force. If Congress has not spoken the law must be learned from other sources." In answer to the Government's argument that the United States could not be estopped, the court merely indicated such doctrine was not applicable.

United States Supreme Court

Smith vs. United States, 292 U.S. 337 - 1934

During the insured's first enlistment he signed an authorization for the premiums to be deducted from his service pay. Upon his reenlistment, he did not sign such authorization. The Supreme Court held there was sufficient evidence to show an abandonment of the contract by the assured. The Court therefore appears to merely determine the intent of the parties as a matter of fact. Inasmuch as the Supreme Court decided this case in 1934, and subsequently in 1953 denied certiorari in the Morrell case, it is submitted the cases are distinguishable on their facts. To the extent that they cannot be reconciled, it is assumed the Morrell case overrules the Smith case.

After reveiwing all the cases, it appears that the decisions may be reconciled by dividing them into two distinct classes into which they appear to naturally and logically fall: (I) Those in which the courts hold that the government may not be bound by some negligent act of an agent NOT AUTHORIZED BY LAW. Examples are misquoting dates of premiums (Kalter vs. U.S., supra)

failing to answer letters regarding status of insurance (U. S. vs. Loveland, supra), erroneously advising insured he had sufficient credits to pay premiums (McIndoe vs. U. S., supra), and others cited. (II) Those cases in which the courts invoke the principle against forfeiture, or in effect hold that the government has waived the premiums, and in which it has failed to do some act, which WAS AUTHORIZED BY LAW. Examples are failing to deduct premiums from service pay where such deduction had been authorized by insured (O'Neill vs. U.S., supra, and Unger vs. U. S., supra), crediting payments to wrong policy (Bouvier vs. U.S., supra), and all the cases cited wherein the government failed to apply funds for payment of premiums.

Upon such a classification of the cases, it will be seen that there exists little conflict in the law as applied, but that on the contrary the law is uniform when the proper principle is applied to the proper set of facts. Only the facts differ, the law is uniform. This law as universally followed by the courts then is that where the government by its erroneous, and unauthorized, usually overt actions, has caused the insured to be misled into permitting his insurance to lapse, the government is not bound by the actions of its agent in such unauthorized actions. Simply, it is a question of agency, where the agent has acted outside the scope of his authority. Although some courts do discuss estoppel, most of the decisions seem to be on the agency principle. On the same agency theory, the courts hold that where the agent has authority to do the act generally, or where he was acting within the scope of his authority, but acted erroneously, the government is nevertheless bound by his actions. This does not appear to be applying any different rules to

insurance cases than is applied to any other subject matter, involving the agency principle. Superimposed upon the agency theory is the principle against forfeitures which is applied everywhere in the law.

Applying the above law to the facts in the appellant's case, it appears that such facts fall into the second class of cases, and further the elements invoking the doctrine against forfeiture are also present. The National Service Life Insurance Act of 1940 grants the agents enforcing the act the authority to deduct the premiums from the retirement pay of insured, (R 15) if the serviceman so desires. The insured, Reed, desired to have the premiums deducted from his retirement pay and authorized the government to do so. (R 15, Exhibit 1). Therefore, it was clearly within the scope of the authority of the government agents to deduct the premium. Under no theory can the principal avoid liability for the acts of his agent in such case. In addition to the foregoing, since at all times when the premium fell due on insured's policy the insurer had funds in its hand to the credit of the insured, the insured could not permit the insurance to lapse, thereby causing a forfeiture. (O'Neill vs. U.S., supra, Unger vs. U.S., supra, Bouvier vs. U.S.) and others cited. In answer to the question raised by the United States Supreme Court in the Smith case, supra, as to the intent of the parties to abandon the policy of insurance, attention is directed to the Army Regulation in force regarding discontinuance of allotments (R 15). CFR Title 10-Army provides that only if the allotment for the payment of premiums is to be DISCONTINUED, then WD AGO form 141 will be processed. The fact that neither the government nor the insured caused such form to be filed is clear refutation of any intention on the part of either

party to abandon the contract.

In summary, therefore, based upon the law as laid down in the Federal Courts, together with the similarity of facts in the present case as compared with such decided cases, it seems conclusive that the trial court erred in refusing to enter a verdict for the plaintiff for the relief prayed.

II

THE COURT ERRED IN ADOPTING THE CONCLUSION THAT UNDER NO CIRCUMSTANCES COULD THE UNITED STATES OF AMERICA BE FOUND IN EFFECT TO BE ESTOPPED TO PROTEST THE NONPAYMENT OF PREMIUMS WHEN THE FAULT WAS DUE ENTIRELY TO THE NEGLIGENCE OR ERROR OF THE UNITED STATES OF AMERICA OR ITS AGENTS.

This point has been covered in the preceding discussion of the facts in the instant case and the law promulgated by the various Federal Courts. However, it should be pointed out that the use of the rather loose legal term "estoppel" by the courts has led to some confusion. If estoppel is held to include those situations wherein an agent creates liability on behalf of his principal through some act of commission or omission within the scope of his authority, then clearly the majority of the cases hold that estoppel in that sense may be invoked against the United States. However, although some of the courts have alluded to "estoppel" most recognize that the term should be correctly applied in such instances only where the United States might otherwise be "estopped" to deny that an agent has acted

outside the scope of his authority. There appear to be no cases on record where such a fact situation has been clearly presented for decision. Dicta indicates that in such a situation the United States because of its peculiar legal status could not be "estopped" to deny the authority of its agent. This seems to be a logical conclusion to reach, since the United States is a creation of the Constitution, and can act only within limits. The Federal government can do only such acts as empowered by a specific law to do. What the United States as principal cannot do, obviously it cannot authorize an agent to do. To permit unauthorized acts of agents to bind the government would be broadening the powers of the government without legislative enactment. However, to hold the United States is bound by acts committed or omitted by an agent, such acts being authorized by law, does not involve the same argument. The reasons for forbidding the government to be estopped in the one case, are entirely absent in the second. Thus in the subject case, whether it is held the government as principal is bound on a theory of estoppel, or on the theory of agency appears academic. It is believed, however, that the decisions correctly hold that the less tortuous theory is that of agency. As pointed out at the trial, all the elements of estoppel appear to be present. The government does not argue that the elements are not present, but rather that estoppel may not be applied against the United States. All the elements being present, the reasons upon which the prohibition against use of estoppel being absent, no argument can be contrived upon which it could not be invoked.

CONCLUSION

The cases bearing on this question have been analyzed with all objectivity. Based upon this analysis, it strongly appears that the only decision that could have been reached by the trial court in this case, in the interest of harmonious Federal law, was for the plaintiff as prayed.

Respectfully submitted,

David S. Casey and
Charles Elwyn Karpinski

By Charles Elwyn Karpinski

*Due to various complications, not material here, the actual appointment of Lawrence Gray as Administrator, CTA, of the estate of Mildred Reed Wood will not occur until the 28th day of September, 1956, but counsel has been authorized by all parties in the estate matter to proceed with the brief.

Charles Elwyn Karpinski